No 3. A right supervening in the author's person accresces to him to whom he is author.

1621. *February* 20. INNES *against* INNES.

WALTER INNES, assignee by Balvenny to a tack set to him of some lands by the Earl of Murray, pursues Alexander Innes for the mails and duties of the lands of certain crops from 1622 to 1626 inclusive. *Alleged*, Balvenny, before the assignation, or Walter Sime the assignee, is denuded of that tack by disponing the same to Mark Mawer, who is denuded thereof in favour of the Earl of Murray; which Earl disponed the lands to the defender by contract, and is obliged to infeft him; and so the pursuer, being denuded of the tack in favours of the Earl, the same accresces to fortify the posterior right given by the Earl to the defender. Admits the allegeance.

Clerk, *Durie*.

Fol. Dic. v. 1. *p.* 513. *Nicolson, MS. No* 281. *p.* 194.

No 4.

1629. *June* 30. LADY DUMFERMLINE *against* The EARL.

A feu vassal of kirk lands neglecting the benefit of the act of Parliament 1584, cap. 7. appointing confirmations to be granted to such feuers who should apply within a limited time, otherwise the feus to be null; the abbot who let the feu having been made thereafter Lord of erection, the supervenient right was found not to accresce to the vassal, seeing it was by his own fault, that confirmation was not obtained.

Fol. Dic. v. 1. *p.* 514. *Durie.*

*** This case is No 15. p. 3061., *voce* CONQUEST.

1664. *July* 19. ELIZABETH DOUGLAS *against* LAIRD of WEDDERBURN.

No 5. The maxim, *Jus superveniens auctori accrescit successori*, does not hold where there does not appear an onerous cause of the successor's right.

ELIZABETH DOUGLAS, as heir to her goodsire, and Sir Robert Sinclair of Lochermachus, her husband, pursue a spuilzie of teinds against the Laird of Wedderburn, who *alleged absolvitor*, because he had tack of the teinds of the said lands from the Earl of Home, and by virtue thereof, was *bona fide* possessor, and behoved to bruik till his tack were reduced; *2do*, That he had right from the Earl of Home by the said tack; which Earl of Home, albeit his right which he had the time of the granting of the said tack was reduced, yet he has since presently in his person the right of the teinds of the lands from John Stewart of Coldingham, which being *jus superveniens auctori*, must accresce to the defender, and defend him in this pursuit. The pursuer *answered* to the first defence, that the defender's *bona fides* was interrupted long before the years libelled. *2do*, Albeit there had been none, yet this author, the Earl of Home's right being reduced in Parliament, his *bona fides* being *sine omni titulo*, is not sufficient; neither needed the tacksman to be called to the reduction, but his right fell *in consequentiam* with the granter of the tack's right. The *second* defence, it was *answered*, That the general maxim of *jus superveniens* has its own fallacies; for the reason of the maxim is, that when any thing is disponed for a cause onerous, equivalent to the value thereof, it is always understood, that the disponer dispones not only what right he hath already, but whatever right he shall happen to acquire, seeing he gets the full value; and therefore, *fictione juris*, whatever right thereafter comes in his person, though it be after the acquirer's right, yet it is holden as conveyed by the acquirer's right, without any new deed or solemnity; but where that reason is wanting, it holds not as first, if it appear that the cause of the disposition is not at the full value; then it is presumed, that the disponer only disponed such right as he presently had; or if the disponer deduce a particular right, as an apprising, or tacks, &c., and either dispones, but that right *per expressum*, or at least dispones not for all right he hath or may have, or does not dispone with absolute warrandice; in these cases, the author's right supervening, accresces not to the acquirer; but himself may make use thereof against the acquirer; much more any other having right from him. *2do*, The maxim holds not, if the author's right be reduced before he acquire the new right, in which case, the first right being extinct, nothing can accresce thereto, but the author may acquire any other new right, and make use thereof. *3tio*, The maxim hath no place, if the author do not acquire a new right to the land, which could be the foundation and ground of the tack granted; as if he acquired but the right of an annualrent, which could be no ground of the defender's tack, much more, if he acquire a right to the mails and duties of the lands, either upon sentence to make arrested goods forthcoming, or an assignation or disposition of the mails and duties made to the author, for satisfying of a debt to him by the disponer. This would be no right to the land that could accresce to validate a tack. The defender *answered*, *1mo*, That his first defence was yet relevant; because, albeit his author's right were reduced, he not being called, his right would be a sufficient colourable title to give him the benefit of a possessory judgment, until his *bona fides* were interrupted by process, because his subaltern right is not extinct, till either by way of action or exception, it be declared extinct, as falling in consequence with his author's right reduced, seeing there is no mention thereof in the decreet of reduction. *2do*, Albeit diligence had been used, yet if the user thereof insisted not, but suffered the defender to possess *bona fide* seven years thereafter, it revives that benefit of a new possessory judgment. No 5.

THE LORDS, as to this point, found that the interruption of the *bona fides* by process, did still take the same away, unless it were prescribed; but found, No 5. that before any process, the defence should be relevant; and, therefore, sustained only process for the year since the citation.

As to the other defence *in jure*, the defender *answered*, That his defence stands yet relevant, notwithstanding all the fallacies alleged, which are without warrant in law, and without example with us, where this maxim hath ever been held unquestionable, that *jus auctoris accrescit successori*, unless the successor's right be expressly limited to a particular right, or to any right the author then had; but the defender need not dispute the equivalence of the cause, unless such express limitation were added, there is no ground to presume an exception upon the personal obligement of warrandice from fact and deed, which oftentimes is put in contracts fully onerous; but on the contrary, there is a several defence upon that very clause, that the Earl of Home, whatever right he should acquire, yet if he should make use of it against this defender, he comes against his own warrandice, whereby he is obliged, that he has done, nor shall do, no deed prejudicial to the defender's tack; neither is there any ground of exception; albeit the author's right was reduced before the new right acquired from that ground, that the new cannot accresce unto the old right, being extinct; because the maxim bears, that it accresces *successori, non jure successoris;* so that albeit the new right do not validate the old right, yet the new right becomes the defender's right *eo momento* that it became the author's right *per fictionem juris*, without deed or diligence, and cannot be taken away by any subsequent deed of that author, more than if before such a deed he had particularly established his successors therein; because the fiction of the law is equivalent to any such establishment; neither is there ground of exception, that the author's right supervening, is but an annualrent, which cannot validate a tack; because, if the author were making use of that annualrent to poind the ground, the defender, upon his tack and warrandice, would exclude him, because he could not come against his own deed and obligement; yea, albeit it were but a right to the mails and duties, *quocunque modo*. THE LORDS having considered the Earl of Home's now supervening right, and that it was but the right of an annualrent of L. 300 Sterling, with a clause, that in case of failure of payment, he might uplift the hail mails and duties till he was paid, and that the defender's tack included only personal warrandice; they repelled the defence, and found, that such right could not accresce to the defender, to validate his tack; wherein some of the Lords had respect to that point that the right was reduced before this new right; but others, as it seems, on better grounds, laid no weight on that, if the clause onerous had been the full value, and equivalent, or if the tack had borne, for all right that I have, or shall acquire, which would accresce to the successor as oft as ever it was acquired, though all the prior rights had been reduced; but in this case, the author not acquiring a new right to the land, but only to the mails and duties, which in effect is but personal, it could not accresce to the defender, more than if the author had been factor to a third party by the new right; and albeit the clauses of personal warrandice might have personally excluded the Earl of Home himself, yet seeing that right could accresce to the defender, the Earl of Home having renounced, or assigned it to a third party; the personal objection against the Earl of Home upon the personal clause of warrandice ceases; neither did the pursuer insist upon the Earl of Home's right, but his own. No 5.

Fol. Dic. v. 1. *p.* 513. *Stair, v.* 1. *p.* 217.

1698. *December* 2. VISCOUNT of ARBUTHNOT *against* ALLARDYCE of that Ilk.

No 6.
A patron who had a tack of the teinds of the parish, communicated it to an heritor so far as concerned his lands. The property of the teinds conferred on the patron by act 1690, was found to accresce to the heritor.

THE mutual reductions and declarators betwixt the Viscount of Arbuthnot and Allardyce of that Ilk were advised. The Lairds of Arbuthnot were patrons of that church, which was a parsonage. As law presumed the teinds of benefices came from the patrons, and so gave them, by our acts of Parliament, right to the fruits of the benefice during the vacancy; so it has permitted patrons without simony to paction with the intrant minister for a local stipend, and get from him a tack of the teinds. The heritors of Arbuthnot were in use to get tacks from time to time from the minister, of the whole teinds of the parish during their life, (for longer tacks except three years were esteemed by the common law a dilapidation.) The lands of Allardyce lying in the same parish, and there being a good correspondence between these two families, there is a contract entered into betwixt the Lairds of Arbuthnot, elder and younger, on the one part, and Allardyce on the other, whereby Arbuthnot assigns him to the standing tacks and prorogations, in so far as concerned his teinds of Allardyce in 1628, and oblige themselves and their heirs never to obtain any tacks or rights of the teinds of Allardyce's lands, and if they do, they shall access to him. By the 23d act of Parliament 1690, Arbuthnot, as patron, gets right to the teinds of the parish, in place of his patronage; and the minister of Arbuthnot, at the commission, obtains an augmentation of his stipend, which Arbuthnot, as patron, would allocate wholly upon Allardyce's tythes, conform to the power given patrons by the act 25th Parliament 1693. Allardyce reclaims, and intents a declarator on the contract, that Arbuthnot's right must accresce to him. The Viscount raises a reduction of the contract, on these grounds, 1*mo*, That it is null and defective, bearing Sir Robert Arbuthnots elder and younger to be contractors, and yet there is but one of them subscribing; and so it is an incomplete deed. 2*do*, It is presumed only to be signed by the father, the liferenter, and so the right died with him. 3*tio*, The meaning of parties-contractors could be only to communicate conventional voluntary rights acquired by the Lairds of Arbuthnet by tacks, &c. but never a legal right introduced by a supervenient act of Parliament, which was *casus incogitatus et improvisus* by the parties, and could be neither foreseen nor provided for; and in such cases *jus auctoris non accrescit successori*. *Answered* for Allardyce, That the contract was obliga-